HUANG YAN TEO

v.

LOW NAM HUI & SONS SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY J
[CIVIL SUIT NO: [MT-1] 22-121-2005]
7 DECEMBER 2006

CIVIL PROCEDURE: *Jurisdiction - Registrar - Whether a Registrar has jurisdiction to hear and determine an application for summary judgment where relief sought was specific performance*

In this case concerning a claim by the plaintiff against the defendant for consultancy fees allegedly payable to the plaintiff for services rendered, a preliminary point of law raised by the defendant – prior to the hearing of its appeal against the decision of the Senior Assistant Registrar allowing the plaintiff's application for summary judgment – required determination. The contentious issue of law was whether a Registrar has the jurisdiction to hear and determine an application for summary judgment where the relief sought was specific performance.

Held (dismissing the preliminary point of law):

(1) The view Abdul Malek J (now PCA) expressed in *Kandasamy Sreenivasagam v. Syarikat Muzwina Development Sdn Bhd* on the issue was the view consistent with the relevant statutory provisions. Registrars do have jurisdiction to hear and determine applications for judgment in an action for specific performance unless and until the statutory provisions are changed to provide otherwise or the Chief Justice directs that such business may not be transacted by Registrars (*Nik Mohd Yusof Nik Ismail v. Majlis Daerah Hulu Selangor* (not foll); *Kandasamy Sreenivasagam v. Syarikat Muzwina Development Sdn Bhd* (foll)). (paras 2 & 24)

Case(s) referred to:

Attorney-General v. Pang Ah Yew [1923] 1 LNS 1 HC ***(refd)***
Banbury v. Bank of Montreal [1918] AC 626 ***(refd)***
Kandasamy Sreenivasagam v. Syarikat Muzwina Development Sdn Bhd [1990] 1 MLJ 15 ***(foll)***
Lim Geak Liang v. East West Umi Insurance Bhd [1997] 4 CLJ 405 HC ***(refd)***

A *Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 SC* ***(refd)***
Nik Mohd Yusof Nik Ismail v. Majlis Daerah Hulu Selangor [2005] 2 CLJ 472 HC ***(not foll)***
Penang Port Commission v. Kanawangi Seperumaniam (No 2) [1997] 1 CLJ 434 CA ***(refd)***
B *Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd [2005] 3 CLJ 825 FC* ***(refd)***
Vincent Tan See Yin v. Noone & Company & Anor [1995] 2 CLJ 195 SC ***(refd)***
Wolverhampton and Walsall Rly Co v. London and North Western Rly Co
C *[1873] LR 16 Eq 433* ***(refd)***
Yong Kon Fatt & Anor v. Hock Seng Construction Sdn Bhd & Anor [2000] 8 CLJ 686 HC ***(refd)***
Yong Mok Hin v. United Malay States Sugar Industries Ltd [1967] 1 LNS 220 FC ***(refd)***

D **Legislation referred to:**
Courts of Judicature Act 1964, ss. 10(3), 16(e)
Rules of the High Court 1980, O. 1 r. 4(2), O. 14 r. 1(1), O. 32 r. 9, O. 81 r. 1(1)
Specific Relief Act 1950, s. 41

E Rules of the Supreme Court [Eng], O. 32 r. 14(1), O. 58 r. 1

Other source(s) referred to:
Philip H Pettit's, *Equity and The Law of Trusts,* 6th edn, p 542

F *For the plaintiff - Tan Hee Soon; M/s Tan Hee Soon & Co*
For the defendant - Wong Kim Fatt (Tee Yee Koon with him); M/s Gulam & Wong

Reported by Suresh Nathan

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JUDGMENT

Syed Ahmad Helmy J:

H **[1]** The plaintiff's claim against the defendant was for consultancy fee allegedly payable to the plaintiff for services rendered. The fee claimed was a liquidated sum of RM3.25 million. But as an alternative to the liquidated sum, the plaintiff included a claim for payment of the fee in the form of shares in
I Harn Len Corporation Berhad. The claim for shares *in lieu* of cash was premised on cl. 2 of a consultancy agreement. Clause 2 states

that on fulfilment of the consultants' obligations under the agreement, the consultants shall be paid the consultancy fee either in cash or partly or wholly *in lieu* thereof in the form of new shares in Harn Len Corporation Berhad allotted for an equivalent value based on the prevailing market price at the date of payment. There was some dispute whether the alternative claim was one for specific performance but reference to Philip H Pettit's treatise titled 'Equity and The Law of Trusts' quickly settles this point. In the 6th edn of the work, the author explained at p 542 the meaning of the remedy of specific performance as follows:

> This equitable remedy consists of an order of the court directing a party to a contract to perform his obligations thereunder according to its terms.

Lord Selborne LC in *Wolverhampton and Walsall Rly. Co. v. London and North Western Rly. Co.* [1873] LR 16 Eq 433 said of this remedy that it:

> Presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed.

[2] Whether a claim in an action includes a claim for specific performance is a question of substance and not form. As Clement Skinner JC (as he then was) pointed out in *Yong Kon Fatt & Anor. v. Hock Seng Construction Sdn. Bhd. & Anor.* [2000] 8 CLJ 686, a claim for such relief need not be 'heralded by the expression 'specific performance'. A litigant who seeks an order of court directing a party to a contract to perform his obligations under it according to the terms thereof so that the parties would be put in the position originally contemplated by them at the time the contract was made is seeking the equitable relief of specific performance. The failure to attach the label 'specific performance' to the printed words of pleadings does not change the essence of the claim. Quite clearly, the alternative claim that the defendant be directed to issue new shares in Harn Len Corporation Bhd. in payment of the plaintiff's consultancy fee was a claim for specific performance of cl. 2 of the consultancy agreement.

[3] Having said that, the plaintiff in this action proceeded to file for summary judgment against the defendant. The senior assistant registrar heard the application and on 6 January 2006, the learned

A senior assistant registrar allowed the application with costs. The defendant filed an appeal against the decision the same day. Just before the appeal came up for hearing, the defendant's solicitors informed the court and the plaintiff's solicitors of their intention to raise a preliminary point of law. The point of law is whether a B registrar has the jurisdiction to hear and determine an application for summary judgment where the relief sought is specific performance.

[4] The point was not taken before the learned registrar at the C hearing of the application for summary judgment and was raised for the first time on appeal. Now, it is trite that the courts rarely permit questions to be raised on appeal if they had not been brought up at first instance. In *Attorney-General v. Pang Ah Yew* [1923] 1 LNS 1, Reay J said:

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> The Courts have often commented on the impropriety of raising, on appeal, questions that have not been raised at the hearing. In *Garden Gully Co. v. McLister*, 1 App. Cas 39, their Lordships of the Privy Council said that though not holding parties strictly to their pleadings, they would not allow defences to be set up on E appeal which had not been suggested in the pleadings or called to the attention of the Courts below, and have refused in other cases to allow such points to be raised.

[5] Reference can also be made to *Banbury v. Bank of Montreal* [1918] AC 626, where Lord Finlay LC said:

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> The course of practice has always been regarded as well settled that points of law alleged entitling the party raising them to verdict or judgment must be made, at the trial, and that if they are not then made they cannot be raised afterwards.

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[6] The Federal Court in *Yong Mok Hin v. United Malay States Sugar Industries Ltd* [1967] 1 LNS 220 explained that the observations of both Reay J and Lord Finlay LC was predicated on the general principle where a decision on a question of law is dependent upon a finding of fact, and no such finding was made H at first instance because the question of law was not raised there, the question of law cannot be raised on appeal. The general principle is not without exception. Lord Parker and Lord Wrenbury succinctly explained the exception in their speeches in *Banbury v. Bank of Montreal (supra)*. In that case, Lord Parker I said:

> There are no doubt cases in which the Court of Appeal have refused to allow points of law not taken in the Court of the first instance to be raised on appeal. **But these cases do not go to jurisdiction,** but to discretion. It may be that if a point of law had been taken below further evidence would have been adduced, or a further or different question left to the Jury. In such cases it would be manifestly unfair and unjust to allow the point to be raised for the first time in the Court of Appeal. In the present case there is no such element of unfairness or injustice. It is not suggested that had the point been taken below any further evidence could have been adduced, or any further or different question left to the jury. Why, then, should not the Court of Appeal have felt itself at liberty to do complete justice between the parties on the evidence before them? I can see no reason at all. (emphasis added).

Lord Wrenbury, in his speech in the same case said:

> It would require a great deal to persuade me that a Court of Appeal is bound to adjudicate wrongly because it had not occurred to either Judge or Counsel to raise a point of law in the Court below. The way the appellant seeks to put it is that the Court of Appeal is not in such case asked to decide wrongly, but only to say that **the point is one which it is not competent to them to decide** at all because it was not argued below. The result of the contention, if it be correct, is that the Court of Appeal is bound to make an erroneous order because of a point of law has been overlooked below. It may well be that under the circumstances the Court of Appeal could not justly allow the point of law to be raised. For instance, it may be that if the point had been raised in the Court of the first instance the party whose interest it was to dispute it would or could have called evidence which would affect the result. If so, the Court of Appeal would no doubt say that it would not be fair to allow it to be raised. But that is a totally different thing from saying that it cannot be raised.

[7] MacIntyre J in *Yong Mok Hin v. United Malay States Sugar Industries Ltd (supra)* said that two points emerge from the observations of Lord Parker and Lord Wrenbury. The first is that a point of law can be taken up for the first time on appeal if it raised a question of jurisdiction. The second is that an appeals court would entertain a point of law not raised in the court of first instance if it would result in the rectification of an erroneous order.

[8] I am doubtful if the first exception Maclntyre J identified is a clear conclusion that can be derived from either of the two learned judges' observations. I am mindful of the fact that the panel in *Yong Mok Hin v. United Malay States Sugar Industries Ltd (supra)* comprised eminent jurists and that their decision have been applied time and again by different panels of the Federal Court (see *Muniandy & Anor. v. Muhd. Abdul Kader Muhd. Saheed & Ors* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116, *Vincent Tan See Yin v. Noone & Company & Anor.* [1995] 2 CLJ 195, *Lim Geak Liang v. East West Umi Insurance Bhd* [1997] 4 CLJ 405, *Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd* [2005] 3 CLJ 825). But I have carefully scrutinised the speeches of the Law Lords in *Banbury v. Bank of Montreal (supra)* and have not been able to discover any part that recognized the jurisdiction exception.

[9] Maclntyre J seems to have formulated this exception from that part of Lord Parker's speech to which I have lent emphasis. To my mind, Lord Parker there was merely explaining that appeals courts have in the past refused to allow a new point of law to be argued on appeal not because the appeals courts lacked jurisdiction to determine the point. On the contrary, the practice of disallowing new points to be raised on appeal was simply to avoid the manifest unfairness to the counter party, who may not have introduced evidence that could have a bearing on the point at first instance due to the fact that the point was not in play there.

[10] The part of Lord Wrenbury's speech to which I have lent emphasis further supports the conclusion that the House in *Banbury v. Bank of Montreal (supra)* was dealing with the question whether an appeals court had jurisdiction to hear and determine a new point of law. The House was not laying down the proposition that a new point of law can always be taken up on appeal if it raises a question of jurisdiction. If my reading of *Banbury v. Bank of Montreal (supra)* is correct, then there is only a single exception set out in that case. That single exception is that an appeals court would allow a point of law to be taken for the first time on appeal if the order appealed against was erroneous as a result of failing to consider the point and it is demonstrated that there is no manifest injustice to the other party to allow argument on the point at the appeal. There would be manifest injustice, for instance, if the other party did not lead material evidence that would have a bearing on the point because the

point was not raised at first instance. This is what Maclntyre J identified as a second exception in *Yong Mok Hin v. United Malay States Sugar Industries Ltd (supra)*.

[11] Although *Banbury v. Bank of Montreal (supra)* may not be authority for the first exception Maclntyre J speaks of in *Yong Mok Hin v. United Malay States Sugar Industries Ltd (supra)*, the jurisdiction limb must nevertheless be an exception as a matter of course. If a court of first instance has no jurisdiction to make the order appealed against, the order must be liable to be set aside *ex debito justitiae*. It has always been the position in law that a court may set aside its own order if it is later brought to the court's attention that the order was one that the court was not competent to make in the first place. In such instances, the general principles of *res judicata* or *functus officio* have no application. This is clear from the judgment of Ahmad Fairuz JCA (now Chief Justice of Malaysia) in *Penang Port Commission v. Kanawangi Seperumaniam (No. 2)* [1997] 1 CLJ 434. If a court that makes an order may, on discovering that it had no jurisdiction to make the order, revoke it, I see no reason why an appeals court may not determine a challenge to jurisdiction raised for the first time on appeal. Even if the jurisdiction limb cannot stand on its own for the reasons given, the second exception Maclntyre J set out in *Yong Mok Hin v. United Malay States Sugar Industries Ltd (supra)* is sufficiently wide to encompass the jurisdiction point. Any order made in want of jurisdiction would clearly be an erroneous order not capable of confirmation by an appellate court, and certainly not on so tenuous a ground as the question of jurisdiction not having been raised in the court below.

[12] I am cognisant of the fact that *Yong Mok Hin v. United Malay States Sugar Industries Ltd (supra)* is a decision of the Federal Court and I am bound to follow it. I allowed the jurisdiction point to be taken up for the first time in the appeal before me and I did so applying the decision of the Federal Court in *Yong Mok Hin v. United Malay States Sugar Industries Ltd (supra)* despite the earlier reservations I expressed on interpretation the Federal Court placed on *Banbury v. Bank of Montreal (supra)*. Whether the jurisdiction limb originates from *Banbury v. Bank of Montreal (supra)* or the general rule that an order made in want of jurisdiction is liable to be set aside *ex debito* by the court that made the order or a superior court is a matter for another panel of the

A Federal Court to decide. Until then, the jurisdiction limb must be deemed to have its genesis in the speeches of Lord Parker and Lord Wrenbury in *Banbury v. Bank of Montreal (supra)*.

[13] Turning to the attack on the registrar's jurisdiction to hear
B and dispose of a summary judgment application where the relief sought is specific performance, reference must be made to the Courts of Judicature Act 1964 ("CJA"). Section 10(3) of the CJA spells out the jurisdiction of registrars and provides that:

> C The Chief Registrar, Registrars, Deputy Registrars, Senior Assistant Registrars and Assistant Registrars appointed under this Act shall subject to this Act or any other written law have the same jurisdiction, powers and duties as the Masters of the Supreme Court, Clerks of Criminal Courts, Registrars and like officers in the Supreme Court of Judicature in England and, in
> D addition, such further jurisdiction, powers and duties as may be prescribed by rules of court.

Section 16(e) of the CJA goes on to state that rules of court may be made:

> E For prescribing what part of the business which may be transacted and of the jurisdiction which may be exercised by Judges in court or in chambers may be transacted or exercised by Registrars.

[14] The starting point is that the jurisdiction of registrars here is
F the same as the jurisdiction of the Masters of the Supreme Court, Clerks of Criminal Courts, Registrars and officers in the Supreme Court of Judicature in England. In England, under O. 32 r. 14(1) of the Rules of the Supreme Court ("RSC"), a summons for
G judgment in an action for specific performance will in the first instance be returnable before the Master. Either party who is dissatisfied with the Master's decision may appeal to the judge. This is provided in O. 58 r. 1 of the RSC. The registrars here, consequently, have the jurisdiction to hear an application for
H summary judgment in an action for specific performance as their counterparts in England exercise jurisdiction over such applications. But that is not the end of the matter. The jurisdiction of the registrars may be curtailed by the CJA or any other written law, including the rules of court made under s. 16(e) of the CJA. I
I have studied the CJA carefully and found that it does not place any restriction on the powers of registrars to grant a decree of specific performance. What is left to be seen is whether the rules of court do.

[15] Now, the rules of court relevant for present purposes are the Rules of the High Court 1980 ("RHC"). To determine if there are any limitations in the RHC on the registrar's jurisdiction, reference must be made to both the general provision setting out the jurisdiction and powers of registrars and the specific rules dealing with summary judgment applications. The general jurisdiction and power of registrars is detailed in O. 32 r. 9 of the RHC, which provides that:

> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted or exercised by a Judge in person or as may by any of these rules be expressly directed to be transacted or exercised by a Judge in person.

[16] The wording of O. 32 r. 9 Rules of the High Court 1980 is clear and unambiguous in that unless and until directions are made by the Chief Justice on the rules expressly conferring jurisdiction to the Judge to transact or exercise such business, the registrar is conferred with the requisite jurisdiction to transact or exercise same.

[17] There is at this time no direction from the Chief Justice that only a judge may hear an application for summary judgment in which the applicant seeks a decree of specific performance. The general provision on the jurisdiction of the registrars, consequently, does not restrict registrars from hearing and disposing of a summons for summary judgment in an action for specific performance. Turning then to the specific provisions dealing with summary judgment in an action for specific performance, there is again nothing in those provisions that restrict a registrar from dealing with the application at first instance. Order 14 r. 1(1) of the RHC, which deals with summary judgment generally in civil cases provides:

> Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that defendant has no defence to a claim included in the writ, or to a particular part or such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, **apply to the Court** for judgment against that defendant. (emphasis added)

[18] Order 81 of the RHC, which particularly deals with summary judgment in actions for, *inter alia*, specific performance provides in r. 1(1) that:

> In any action begun by writ indorsed with a claim:
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> (a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or
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> (b) for rescission of such an agreement; or
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> (c) for the forfeiture or return of any deposit made under such an agreement,
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> the plaintiff may, on the ground that the defendant has no defence to the action, **apply to the court** for judgment, (emphasis added).

[19] In both O. 14 r. 1(1) and O. 81 r. 1(1) of the RHC, the plaintiff makes the application to the court. "Court" is defined in O. 1 r. 4(2) of the RHC. It reads:

> In these rules, unless the context otherwise requires, "Court" means the High Court or any one or more Judges thereof, whether sitting in Court or in Chambers, or the Registrar; but the foregoing provision shall not be taken as affecting any provision of these rules and, in particular, Order 32, rule 9, by virtue of which the authority and jurisdiction of the Registrar is defined and regulated.

[20] It is clear that the reference to "court" in O. 14 r. 1(1) and O. 81 r. 1(1) of the RHC includes the registrar, unless the Chief Justice has under O. 32 r. 9 directed that registrars have no power to transact any business under these rules. As I mentioned earlier, there is no such direction from the Chief Justice at this time, and as such, the scope of the rules is wide enough for a summons for judgment in an action for specific performance to be heard in the first instance before a registrar.

[21] There are only two reported cases that dealt with the jurisdiction of a registrar to hear a summons for judgment in an action for specific performance, that is *Kandasamy a/l Sreenivasagam v. Syarikat Muzwina Development Sdn. Bhd.* [1990] 1 MLJ 15 and *Nik Mohd Yusof bin Nik Ismail (suing on behalf of Persatuan Pemilik*

dan Penduduk Serendah Golf Resort) v. Majlis Daerah Hulu Selangor [2005] 2 CLJ 472. The views expressed in both cases are divergent. The former is consistent with the views I have expressed on the issue. The latter, which is a much more recent case was for obvious reasons the only authority on which learned counsel for the defendant relied on and fashioned his arguments.

[22] In *Kandasamy*'s case, the plaintiff agreed to purchase a piece of property from the defendant. The defendant was required to deliver vacant possession within 24 months of the agreement. When the defendant failed to do so, the plaintiff filed a writ seeking, *inter alia,* vacant possession of the property. The plaintiff proceeded to file a summons for final judgment against the defendant. The application came up for hearing before the senior assistant registrar at which time defendant's counsel argued that the registrar had no jurisdiction to decide the summons as it involved specific performance of an agreement for the sale and purchase of property. The registrar agreed and remitted the case to Abdul Malek J (now PCA). The learned judge, on the point of jurisdiction, said:

> The plaintiff had applied by way of summons-in-chambers ... for an order that the plaintiff be at liberty to enter final judgment against the defendants ... Applications like these are normally dealt with by the senior assistant registrar but when the matter came up before her, learned counsel for the defendants had argued that she had no jurisdiction to decide as it involved specific performance ... *The learned senior assistant registrar had agreed with counsel for the defendants and had remitted the case up to me. The learned senior assistant registrar may have been in error here as applications for specific performance of an agreement fall under O. 81 of the Rules of the High Court 1980 where the word 'Court' is used. Order 1 rule 4(2) of the Rules provides that 'Court' means the High Court or any one or more judges thereof, whether sitting in court or in chambers, or the registrar.*

[23] *Nik Mohd Yusof*'s case, however, was not an action for specific performance. The issue in that case was whether the registrar could hear an application to enter default judgment in an action for a declaration. Suriyadi J (now JCA) held that a registrar had jurisdiction to grant declaratory orders under s. 41 of the Specific Relief Act 1950. The learned judge also expressed *obiter dicta* his opinion on a registrar's jurisdiction to hear matters of specific performance. In relation to a registrar's jurisdiction to hear such matters, the learned judge said:

A To side track slightly, as an analogy I would like to advert to actions under O. 81 of the Rules of the High Court 1980, which deals, amongst others with specific performance matters. Needless to say, for matters of specific performance it has always been accepted that only the High Court judge in person has that jurisdiction, and certainly not the registrar.

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[24] An *obiter dicta* view expressed by so learned a judge as Suriyadi J (now JCA) is highly persuasive and deserving of the greatest respect. But I regret on this occasion I am unable to concur in the view the learned judge has expressed in the passage C quoted above. I am unable to reconcile that view with the statutory provisions referred to earlier in this judgment. The view Abdul Malek J (now PCA) expressed in *Kandasamy a/l Sreenivasagam v. Syarikat Muzwina Development Sdn. Bhd. (supra)* on the issue is the view consistent with the relevant statutory D provisions. Registrars do have jurisdiction to hear and determine applications for judgment in an action for specific performance unless and until the statutory provisions are changed to provide otherwise or the Chief Justice directs that such business may not be transacted by registrars.

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[25] For reasons already given, I dismissed the preliminary point of law with costs.

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